Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

Michael H. Bostron,

Petitioner,

v.

Commissioner of Social Security,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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59 pp

QUESTIONS PRESENTED

1. Does Executive Order 11478 violate the due process and equal protection under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the Due Process Clause of the Fifth Amendment to the United States Constitution?

2. Does the federal district court's denial of Petitioner's Fifth Amendment claim based on format technicalities deprive him of due process and equal protection under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and under the Due Process Clause of the Fifth Amendment to the United States Constitution as well as deprive him of the right to petition the courts for redress of grievances under the Right to Petition Clause of the First Amendment to the United States Constitution?

3. Does the court of appeals dismissal of an appeal without addressing the issues that were appealed deprive a person of due process and equal protection under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and under the Due Process Clause of the Fifth Amendment to the United States Constitution and deprive a person the right to petition the courts for redress of grievances under the Right to Petition Clause of the First Amendment to the United States Constitution?

4. Does the court of appeals dismissal of an appeal by issuing an unpublished opinion, which is not a binding precedent in their circuit, deprive a person of due process and equal protection under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and under the Due Process Clause of the Fifth Amendment to the United States Constitution and deprive a person the right to petition the courts for redress of grievances under the Right to Petition Clause of the First Amendment to the United States Constitution?

5. Does the Federal District Court and the Fourth Circuit Court of Appeals deprive Petitioner of his due process and equal protection rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and under the Due Process Clause of the Fifth Amendment to the United States Constitution and deprive a person the right to petition the courts for redress of grievances under the Right to Petition Clause under the First Amendment to the United States Constitution by dismissing all remaining claims and denying a subsequent jury trial after dismissing a hung jury?

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OPINIONS BELOW

The judgment and opinions of the United States Court of Appeals for the Fourth Circuit is unpublished and are attached at page 1a of the Appendix and en banc at page 40a of the Appendix. The August 24, 1998 opinion of the district court is attached at page 4a of the Appendix. The July 19, 2000 opinion and order of the district court is attached at page 22a of the Appendix.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered an unpublished decision on January 18, 2001 and denied a petition for rehearing en banc on April 4, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Due Process Clause of Fourteenth Amendment to the United States Constitution provides in pertinent part that no State shall "deprive any person of life, liberty, or property, without due process of law".

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides in pertinent part that no State shall "deny to any person within its jurisdiction the equal protection of the laws".

The Equal Protection Clause of the Fifth Amendment to the United States Constitution provides in pertinent part that no State shall "be deprived of life, liberty, or property, without due process of law".

The Right to Petition Clause of the First Amendment to the United States Constitution provides in pertinent part that no State shall "or the right of the people . . . to petition the Government for a redress of grievances".

STATEMENT OF THE CASE

The Petitioner claimed a Fifth Amendment violation in his original pleading in addition to his other bases. This claim of a Fifth Amendment violation is clearly stated in the first paragraph of his complaint which was filed on September 16, 1997 after meeting all of the administrative requirements imposed upon federal employees.

The record reveals that the Defendant recognized that Petitioner filed his September 16, 1997 complaint on a Fifth Amendment violation basis in addition to other bases and this has been ably documented by Plaintiffs' trial attorney, E. David Hoskins, Esq., in his several Memorandums of Support.

In a decision on August 24, 1998, the District Court for the District of Maryland first states that Petitioner made a Fifth Amendment claim, but later, in footnote 3, declared that no Fifth Amendment claim had been asserted because it had not been set out in a separate formal count. The Federal District Court Judge denied Petitioner's Fifth Amendment pleading.

The Petitioner filed a motion to amend his pleading to clarify his Fifth Amendment pleading by stating a separate Fifth Amendment Count by way of a motion on July 16, 1999.

The Federal District Court Judge denied Plaintiff's motion to amend his pleading by way of his decision on July 21, 1999.

The Federal District Court Judge dismissed all remaining claims and denied Plaintiff a subsequent jury trial after a hung jury had been dismissed on May 15, 2000 by way of decision on July 19, 2000.

The Petitioner filed a Notice of Appeal on September 18, 2000 and a Statement of Appeals Issues on September 28,

2000 in the United States District Court for the District of Maryland.

The Petitioner filed an Informal Brief on October 19, 2000 in the United States Court of Appeals for the Fourth Circuit involving issues relevant to this petition. The first issue is the Federal District Court Judge's denial of Appellant's Fifth Amendment pleading in his original complaint and involving the Federal District Court Judge's denial of Appellant's motion to amend his pleading to clarify his Fifth Amendment pleading by stating a separate Fifth Amendment Count. The second issue is the constitutionality of Executive Order 11478 which requires using sex and race in government personnel selection processes and which has been raised a barrier to Petitioner's access to the agency's promotion process. As a result of these preferential selection processes for women and minorities, the Social Security Administration agency's (SSA's) staffing profile is approximately 73% female while the National Civilian Labor Force (NCLF) statistic is approximately 43%; black females hold about 24% of the SSA's positions and represent about 6% of the NCLF; white males hold about 20% of the SSA's positions and represent about 42% of the NCLF.

The United States Court of Appeals for the Fourth Circuit issued an unpublished decision on January 18, 2001 affirming the judgment of the District Court's July 19, 2000 decision without addressing the appealed issues involving the District Court's August 24, 1998 or July 21, 1999 decisions.

The Appellant filed a Petition for Rehearing en Banc in the United States Court of Appeals for the Fourth Circuit on February 23, 2001 stating 12 reasons for rehearing.

The United States Court of Appeals for the Fourth Circuit denied Appellant's Petition for Rehearing en Banc on April 4, 2001 without comment or consideration of the reasons for rehearing because "no member of this Court requested a poll on the petition for rehearing en banc".

REASONS FOR GRANTING THE WRIT

I. Executive Order 11478 Requires "Reverse Discrimination" Against Non-Minority Males in Federal Employee Selection Procedures

Review should be granted because this case presents extraordinarily important questions of constitutional law and serious conflicts among the lower courts interpretations of important prior decisions of this court.

The Executive Order 11478 has serious constitutional impacts upon all federal employees caught up in the Administration's illegal efforts to implement affirmative action and diversity in their continuing to effect personnel actions in the government based upon sex and race without any claim to be correcting past discrimination and without narrowly tailoring their affirmative action plan to correct specific past discrimination and without any plan to terminate their affirmative action plan when effects of past discrimination are eliminated as was determined in the Supreme court decision of *Adarand v. Pena*, 115 S. Ct. 2097 (June 12, 1995).

The Fourth Circuit Court of Appeals, in its unpublished decision in *Sonntag v. McConnell*, 1998 U.S. App. Lexis 21107, 3 (1998)(unreported), recognized this constitutional issue and ordered both Appellant and Appellee to brief them on the conflict between Executive Order 11478 and the Fifth Amendment, but was thwarted by a last minute settlement.

Executive Order 11478 requires using sex and race in government personnel selection processes. The Social Security Administration agency's (SSA's) staffing profile is approximately 73% female while the National Civilian Labor Force (NCLF) statistic is approximately 43%; black females hold about 24% of the SSA's positions and represent about 6% of the NCLF; white males hold about 20% of the SSA's positions and represent about 42% of the NCLF. The Petitioner, being a white male, was a potential victim of any

discriminatory personnel selection process which had an adverse impact on white males. *See President v. Vance*, 627 F.2d 353 (D.D.C. 1980) (plaintiff a potential victim of anti-promotional policy affecting minorities). Individuals who are victimized by an employment practice can file individual disparate impact claims without having a class action certified. *See Craig v. Alabama State University*, 804 F.2d 682, 686 (11th Cir., 1986). Statistical evidence is relevant to individual claims, although it does not carry the same weight as in class action claims. *See Taylor v. Secretary of the Army*, 583 F. Supp. 1503, 1509 (D. Md. 1984), and *Krodel v. Young*, 748 F. 2d 701, 709-710 (D.C. Cir. 1984).

Petitioner's Fifth Amendment claim involves the Agency's use of sex and race in its personnel actions based upon its Affirmative Employment Program for Women and Minorities which started somewhere in 1987 or 1988, its Affirmative Action Plan mentioned in the Peter Wheeler memorandum of June 26, 1980, and in the September 6, 1977 memo from F. D. DeGeorge, Associate Commissioner to James B. Cardwell, Commissioner of Social Security, in which sex and race are discussed in relation to temporary promotions made and the agency's EEO program. To disallow the hearing of such a serious constitutional issue based upon an arbitrary procedural denial violates Petitioner's constitutional rights and allows the continued the "legalized" discrimination against white males.

II. District Court Incorrectly Denied Petitioner's Motion for Leave to Amend the Pleading to Include a Clearer fifth Amendment Claim

Federal Rule of Civil Procedure 15(a) states that ". . . a party may amend the party's pleading only by leave of the court or by written consent of the adverse party and **leave shall be freely given when justice so requires.**" (Emphasis supplied). " It is axiomatic that the Federal Rules of Civil Procedure allow liberal amendment of pleadings throughout the progress of a case. *Elmore v. Corcaran*, 913 F.2d 170, 172 (4th Cir. 1990); citing *Brandon v. Holt*, 469 U.S. 464,

471 (1985). In *Forman v. Davis*, 371 U.S. 178, 182 (1962), the Supreme discussed the application of the Rule:

> If the underlying facts of circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded on opportunity to test his claim on the merits. In the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. -- the leave sought should, as the rules require, be 'freely given.'

Thus, courts have emphasized that the "amendment should normally be given." See e.g., *Nerney v. Valente & Sons Repair Shop*, 66 F.3d 25, 28 (2d. Cir. 1995)(citing *Forman v. Davis*, 371 U.S. at 182).

When courts deny a party's Rule 15 motion for leave to amend it is usually because the defendant "would be unduly prejudiced if [plaintiff] were allowed to shift the focus of its complaint." *Gable & Associates v. Dean Witter Reynolds*, 1998 U.S. App. LEXIS 29831, 5 (4th Cir. 1998). The Court of Appeals for the Second Circuit has addressed the issue of what is considered undue prejudice stating:

> In determining what constitutes "prejudice," we consider whether the assertion of the new claim would: (i) require the opponent to expand significant additional resources to conduct discovery and prepare for trial; (ii) significantly delay the resolution of the dispute; or (iii) prevent the plaintiff from bringing a timely action in another jurisdiction.

Block v. First Blood Associates, 988 F.2d 344, 250 (2d Cir. 1993). Courts are also likely to deny a motion for leave to amend a complaint when "the motion appears to be no more than an apparent attempt to avoid the likely effect of summary

judgement." *Gable*, *supra* at 7; quoting *Kleinhans v. Lincoin Savings Profit Sharing Trust*, 810 F.2d 618, 625 (7th Cir. 1987).

In this case, there was no such undue delay, bad faith or undue prejudice. Petitioner simply sought to amend his complaint to add a specific count alleging that the SSA's affirmative employment program, created under the authority of Executive Order 11478, violates Petitioner's equal protection rights as guaranteed by the Fifth Amendment of the United States Constitution. The request was solely to clarify any confusion with regard to Petitioner's intent to allege a specific Fifth Amendment claim in their original complaint. The first paragraph of the original complaint reads as follows:

> Through a deliberate course of conduct beginning as early as 1977, the Social Security Administration, hereafter referred to as "SSA" of "the Agency," and the United States Department of Health and Human Services ("HHS"), have illegally discriminated against Caucasian males in the hiring and promotion of employees and in the granting of performance ratings and cash and non-cash awards to employees, in violation of 42 U.S.C. 2000e *et. seq.* (1995), the Age Discrimination in Employment Act, 29 U.S.C. § 623, and the **Fifth Amendment of the United States Constitution.**

Count 1 of the original complaint (p. 45) is titled "Intentional Employment Discrimination Based Upon Sex and Race." The first paragraph of the count (#177) realleges, as if full set forth, each and every earlier paragraph contained in the complaint. Thus, it was Petitioner's intent that the Fifth Amendment claim be included in Count 1. See Federal Rule 10(c).

Defendants would not have been prejudiced by this amendment because they at all times believed that Petitioner had alleged an independent Fifth Amendment claim (see Rule 15(b), **Amendments to Conform to the Evidence**).

The Court had also acknowledged Petitioner's independent Fifth Amendment claim. In the Order denying Petitioner's class certification, dated August 24, 1998, the Court stated in the initial paragraph that "under the Fifth Amendment to the United States Constitution . . . Plaintiffs . . . claim that they have been subjected to illegal reverse discrimination as a result of the SSA's implementation of affirmative action policies and programs." Later in that opinion, however, in footnote three the Court contradicted its original statement and stated that:

> Although Paragraph 1 of the complaint indicates that suit has been brought under the ADEA and the Fifth Amendment, neither Count asserts such claims. Accordingly, the only claims before the Court are those alleged in Counts I and II under Title VII.

Petitioner, for reasons discussed herein, did not agree with that conclusion. Moreover, as already discussed, Defendants gave no indication that they agreed with that conclusion either.

Finally, Petitioner acknowledges that in the August 24, 1998 scheduling order, the Court specified that motions to amend pleadings were to be filed within 90 days of that order, however, as the Court's holdings were apparently confusing to both the Petitioner and Defendants, and since neither a pretrial conference nor a trial date had been set in this case, Petitioner believed that the 90 day limit should not impede the granting of the motion to amend.

III. The District Court Incorrectly Applied Federal Rule 10(b) in Denying Petitioner's Fifth Amendment Claims

During oral argument held July 9, 1999, the Court stated that Petitioner had failed to state an independent Fifth Amendment claim because under Federal Rule 10(b) states:

> **Paragraphs: Separate Statements.** All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon **a separate transaction or occurrence** and each defense other than denials shall be stated in a separate count of defense whenever a separation facilitates the clear presentation of the matters set forth. (Emphasis added)

As the rule clearly states, only those claims founded upon a separate transaction or occurrence are required to be stated in a separate count.

Courts have consistently refused to enforce Rule 10(b) when claims based on the same transaction or occurrence are included in the same count. In *Bazal v. Belford Trucking Co.*, 4423 F. Supp. 1089 (S.D. Fla., 1977), the Court held that Rule 10(b) does not mandate that a complaint state independently a contract claim and a tort claim, where the latter is outgrowth of the former, because circumstances underlying both claims are similar, if not, identical. In *Textile Banking Co. v. S. Starensier, Inc.*, 38 F.R.D. 492 (D. Mass. 1965), the Court held that the plaintiff was not required to state its claim based on conspiracy and its claim based on fraud in separate counts because the complaint was based on one factoring contract and one series of transactions which arose under that contract, and it gave the original defendant, as well as those to be added, fair and adequate notice of the nature and basis of the plaintiff's claims. In *Perkins v. School Board of Pinellas County, Florida*, 152 F.R.D. 227 (M.D. Fla., 1993), a racial discrimination action, the Court held that the plaintiff was not required to separate each allegation of discrimination into separate counts. Moreover, the Court stated that legal theories of recovery must not be separated. In *Perkins*, the plaintiff combined a Title VII claim with a §1981 claim all

within one count. Defendant filed a Motion to Dismiss alleging the Rule 10(b) required that each claim be filed in a separate count. The Court disagreed explaining that "such occurrences are not separate and distinct requiring separate counts, but rather are alleged to established a discriminatory pattern of conduct that Plaintiff asserts created a hostile work environment." *Id.* at 229. See also *Vance v. Southern Bell Telephone*, 863 F.2d 1503, 1510 (11th Cir. 1987).

In most cases discussing Rule 10(b) the overriding concern emphasized by the courts is whether the complaint is sufficiently clear so as to enable the defendant to effectively formulate a response. *Shaw v. Russell Trucking Line, Inc.*, 542 F. Supp. 776 (W.D. Pa. 1982), see also *Peterson v. Stanczak*, 48 F.R.D. 426 (D.C. Ill. 1969)(amendment not required where it would not facilitate sufficiently clearer presentation of issues to justify delay in the proceedings.); *National Cold Storage Co. v. Port of New York Authority*, 24 F.R.D. 404 (S.D.N.Y., 1959). In the Petitioner's case, his intent to pursue claims under both Title VII and the Fifth Amendment was obviously clear, at least to the Defendants, as evidenced by the statements they made during the course of the litigation and their ability to oppose the Petitioner's motion for summary judgement.

IV. The District Court was Without Jurisdiction to Raise a Federal Rule 10(b) Issue on its Own in Denying Petitioners Fifth Amendment Claim

Another issue that needs to be addressed is whether the court has jurisdiction to raise a potential Rule 10(b) problem on its own. Petitioner has not been able to find any case law that supports that proposition. In fact, in *Mechanical Contractors Association of Amerīca Inc. v. Mechanical Contractors Association of Northern California, Inc.*, 342 F.2d 393 (9th Cir., 1965), the U.S. Court of Appeals for the Ninth Circuit explained that when a party fails to comply with Rule 10(b),

> The Federal Rules provide a remedy for failure to do so, either by demurrer or by motion, but the fact that more than one cause of action may be stated and that such courses of action are not stated separately hardly goes to the jurisdiction or the court.

Id. at 398. Defendants have at no time during the proceedings filed a motion to dismiss alleging that Petitioner failed to comply with Rule 10(b).

V. The Court Must Restore Petitioner's Fifth Amendment Right to Equal Protection

Petitioner requests the Court to restore his Fifth Amendment right to equal protection that was denied to him by the SSA giving preferential treatment in hiring and promotions to women and minorities under the affirmative action plans implemented by the SSA, as a result of Executive Order 11478, which deprived white males of the same right to promotions based upon merit and not the objectives of increasing the numbers of women and minorities at certain grade levels. This Fifth Amendment right was denied by the District Court and the Fourth Circuit Court of Appeals by denying him a hearing under the Fifth Amendment. This deprivation of his Fifth Amendment right on the technicality of format is in direct conflict with prior decisions of this Court and other lower Courts. Furthermore, the defendant agency conducted its discovery and held itself out as defending a Fifth Amendment claim as reflected in the trial court proceedings.

Petitioner requests the Court to address the issues relating to the District Court decisions made on August 24, 1998 and July 21, 1999 that appellant raised in his court of appeal's filings and that were not addressed by the court of appeals in their decisions which deprived petitioner of due process, equal protection and right to petition the courts for redress of grievances.

Petitioner requests the Court to address the issue relating to the July 19, 2000 decision to dismiss all remaining claims and denying a subsequent jury trial after dismissing a hung jury.

CONCLUSION

There are substantial and very distinct constitutional issues at stake here in which the United States District Court for the District of Maryland and the United States Court of Appeals for the Fourth Circuit have decided important federal questions of constitutional issues involving due process and equal protection under the Equal Protection Clause under the Fourteenth Amendment to the United States Constitution and under the Due Process Clause under the Fifth Amendment to the United States Constitution and deprives a person the right to petition the courts for redress of grievances under the Right to Petition Clause under the First Amendment to the United States Constitution in a way that conflicts with relevant decisions of this Court and other Circuit Courts.

Respectively submitted,

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JUDGEMENT

FILED: January 18, 2001

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 00-2238
CA-97-3154-H

MICHAEL H. BOSTRON

Plaintiff – Appellant

and

MAURICE R. DUBOIS; JOHN E. BOYER

Plaintiffs

v.

KENNETH S. APPEL, Commissioner of Social Security

Defendant - Appellee

Appeal from the United States District Court
for the District of Maryland at Baltimore

In accordance with the written opinion of this court filed this day, the Court affirms the judgment of the District Court.

/s/ Patricia S. Connor
CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-2238

MICHAEL H. BOSTRON,

Plaintiff – Appellant,

and

MAURICE R. DUBOIS; JOHNE E. BOYER,

Plaintiffs,

versus

KENNETH S. APFEL, Commissioner of Social Security,

Defendant – Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Alexander Harvey II, Senior District Judge. (CA-97-3154-H)

Submitted: November 22, 2000 Decided: January 18, 2001

Before NIEMEYER, MICHAEL, and KING, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Michael H. Bostron, Appellant Pro Se. Larry David Adams, Assistant United States Attorney, Baltimore, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Michael H. Bostron appeals the district court's order granting judgment as a matter of law to the Commissioner in Bostron's civil action in which he alleged employment discrimination claims. We have reviewed the record and the district court's opinion and find no reversible error. Accordingly, we affirm on the reasoning of the district court. *See Bostron v. Apfel*, No. CA-97-3154-H (D. Md. July 19, 2000). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF
MARYLAND

MICHAEL H. BOSTRON, et al.,

Plaintiffs

vs. CIVIL NO. H-97-3154

KENNETH S. APFEL, et al.,

Defendants

E. David Hoskins and Law Offices of Peter G. Angelos, P.C., Baltimore, Maryland, and H. Thomas Howell, William F. Gately and Howell, Gately, Whitney & Carter, LLP, Towson, Maryland, for plaintiffs.

Donna C. Sanger, Assistant United States Attorney and Larry D. Adams, Assistant United States Attorney, Baltimore, Maryland, for defendants.

HARVEY, Senior Judge

DATED: August 24, 1998

Three employees of the Social Security Administration (the "SSA") have here filed a class action complaint alleging discrimination under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, under the Age Discrimination in Employment Act (the "ADEA"), 29 U.S.C. § 623, *et seq.* and under the Fifth Amendment to the United States Constitution.[1] Plaintiffs, who are white males, claim

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[1] The complaint named as defendants John J. Callahan, Acting Commissioner of the Social Security Administration, and Donna Shalala, Secretary of the Department of Health and Human Services. Kenneth S.

that they have been subjected to illegal reverse discrimination as a result of the SSA's implementation of affirmative action policies and programs.

Presently pending before the Court is plaintiffs' motion for class certification. Plaintiffs ask that this case be maintained as a class action on behalf of a class of plaintiffs, which would include all white males employed by the SSA at the GS-12 and GS-13 levels who were not selected or promoted or who were otherwise subjected to illegal, disparate treatment. At a scheduling conference held after defendants had answered the complaint, counsel for plaintiffs requested that the Court address at an early stage their proposed motion for class certification. A Preliminary Scheduling Order was accordingly entered directing that discovery pertaining to the class action issues should begin and that such discovery should relate to the question whether plaintiffs' claims satisfied the requirements of Rule 23, F.R.Civ.P. A schedule for the completion of discovery and for the filing and briefing of plaintiffs' motion seeking class certification was set by that Order. Thereafter, interrogatories were served and answered by both plaintiffs and defendants, documents were produced and depositions were taken.

The parties have now submitted lengthy memoranda and voluminous exhibits in support of and in opposition to plaintiffs' pending motion for class certification, including excerpts from depositions taken during the preliminary discovery period. A hearing on the pending motion has been held in open court. For the reasons to be stated herein, plaintiffs' motion for class certification will be denied.

Apfel is now Commissioner of the Social Security Administration and has been substituted for John J. Callahan as a defendant in this case.

I

Background Facts

The headquarters of the SSA are located in Woodlawn, Maryland. At this site, there are ten Deputy Commissioner offices and several Associate Commissioner offices. Besides its headquarters site, the SSA maintains throughout the United States ten regional offices, six Program Service Centers, three Data Operations Centers, three Teleservice Centers and over thirteen hundred hearing and field offices.

As of 1996, there were 65,567 persons employed by the SSA. A majority of these employees are located at the SSA's headquarters in Woodlawn. As of September 30, 1995, there were throughout the country 3,311 white males employed by the SSA at the GS-12 level and 1,793 employed at the GS-13 level.

Pursuant to 42 U.S.C. § 2000e-16, the SSA like other federal agencies has prepared on an annual basis an Affirmative Employment Plan ("AEP") designed to eliminate discrimination in employment. Plans prepared by the SSA contain, *inter alia*, work force analyses examining the distribution of women and minorities in job categories and promotions, recruitment and training initiatives and numerical objectives for increasing the representation of under represented groups in specific grade levels. Based on SSA's overall AEP, each regional office and component of the SSA develops its own AEP based on the composition of employees within that individual office.

Plaintiffs rely on statistical evidence in support of their motion for class certification. An AEP "Tracking Report" for fiscal year ("FY") 1994 indicates that out of 141 promotions to the GS-13 to 15 levels, white males received only 39% of the selections although comprising 54.9% of the work force at those levels. An AEP "Accomplishment Report" for FY 1995 relating to SSA employees in the Office of the Deputy Commissioner for Operations indicates that from FY 1992

until FY 1995 representation of males at the GS-12 level decreased from 56% to 46.5% and at the GS-13 level decreased from 64.8% to 59.8%, while representation of females increased from 44% to 53.5% and from 35.2% to 40.2% at those two levels, respectively. However, the AEP Tracking Report had also indicated that with respect to white male representation at the GS-13 to GS-15 levels, "white men were represented at levels well above their CLF [Civilian Labor Force] representation (54.9% versus a CLF of 42.6%). Their percent representation in the highest grades was over twice their percent representation in the SSA work force."

Plaintiff Michael H. Bostron is now 45 years of age. He was first hired by the SSA in 1972 as a student assistant at level GS-3. By July of 1978, he had been promoted to the GS-12 level. In August of 1981, Bostron was promoted to the GS-13 level as an Operations Research Analyst in the Office of Assessment. Subsequently, in January of 1994, Bostron was reassigned to the supervisory position of Supervisory Program Analyst at the GS-13 level. Thereafter, in June of 1995, he was reassigned to his current non-supervisory position at the GS-13 level of Management Analyst in the SSA's Office of the Deputy Commissioner for Finance, Assessment and Management.

Plaintiff Bostron alleges that he was named to the "Best Qualified List" for promotions 154 times but was rejected for each of these positions. From 1979 through 1997, Bostron received nineteen cash awards and one non-cash award. Most recently, in 1995, Bostron applied for but was denied promotion to a GS-14 position as Program Policy Officer in the Office of the Deputy Commissioner for Programs. He alleges that he has suffered discrimination on the basis of his sex, race and age during his employment at the SSA.

Plaintiff Maurice R. duBois is 61 years of age and was first employed by the SSA in 1967 as a GS-7 Health Insurance Analyst in the Bureau of Health Insurance. In 1973, he was promoted to the position of Supplemental Security Income Planning Specialist in the Bureau of Supplemental

Security Income at level GS-13. Subsequently, in 1986, duBois was promoted to the position of Supervisory Social Insurance Specialist at level GM-13 in the SSA's Office of Assessment. In 1994, duBois was reassigned to his current, non-supervisory position of Social Insurance Specialist at level GS-13 in the SSA's Office of the Deputy Commissioner for Finance, Assessment and Management.

Plaintiff duBois claims that the SSA has denied numerous applications for promotion filed by him, despite the fact that he has occupied several supervisory positions during his tenure at the SSA. According to duBois, he has been denied these promotions as a result of age and sex discrimination and a discriminatory rating system under which female employees have received a disproportionate number of outstanding ratings.

Plaintiff John E. Boyer is 56 years of age. He was first employed by the SSA in 1973 as a Social Insurance Claims Examiner in the SSA's Bureau of Disability Insurance, Division of Initial Claims. In March of 1980, Boyer was promoted to the position of Social Insurance Specialist at level GS-12 in the Office of Operational Policy and Procedures. Since February of 1993, Boyer has served as a Program Analyst in the Data Management and Analysis Branch of the Disability Program Information and Studies Division in the Office of the Deputy Commissioner for Programs and Policy. Since 1980, Boyer has remained at the GS-12 level.

Plaintiff Boyer alleges that his performance rating has dropped dramatically from a nearly outstanding level to barely satisfactory. According to Boyer, defendant SSA has been giving a disproportionate number of outstanding ratings to female employees with an adverse impact upon his opportunities to obtain promotions. He alleges discrimination on the basis of his sex.

All three plaintiffs have filed both informal and formal class action complaints with the SSA's Office of Civil Rights

and Equal Opportunity ("OCREO"). Following various administrative proceedings, the administrative class action complaints of plaintiffs Bostron and duBois have now been dismissed by the SSA based on recommendations of the Equal Employment Opportunity Commission.[2] This civil action was instituted by the plaintiffs in this Court on September 16, 1997.

II

Plaintiffs' Claims and Requested Relief

In their complaint, plaintiffs have requested that this Court certify this suit as a class action under Rule 23 and appoint plaintiffs and their counsel to represent the class. Plaintiffs are here seeking injunctive relief including immediate promotions to GS-15, back pay, compensatory damages for emotional harm and attorneys' fees. The complaint contains two counts. Count I seeks a recovery for intentional employment discrimination based upon sex and race. In Count II, plaintiffs Bostron and duBois seek a recovery for unlawful retaliation subsequent to the filing by them of administrative civil rights complaints.[3]

Relying on *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995), plaintiffs contend that the overall AEP adopted by the SSA as well as the regional AEP's are unconstitutional.[4] In *Adarand*, the

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[2] The SSA has not as yet finally acted on the administrative class action complaint filed by plaintiff Boyer.

[3] Although Paragraph 1 of the complaint indicates that suit has been brought under the ADEA and the Fifth Amendment, neither Count asserts such claims. Accordingly, the only claims before the Court are those alleged in Counts I and II under Title VII.

[4] Relying on a report entitled "Evaluation of Social Security Administration Affirmative Act Programs," the SSA claims that its AEP's do not violate *Adarand* and that they are in compliance with a Memorandum issued by the President in 1995 directing that all affirmative

Supreme Court ruled that, to satisfy constitutional requirements, federal affirmative action programs employing racial classifications must serve a compelling governmental interest and must be narrowly tailored to further that interest. *Id.* at 235.

In their Proposed Class Certification Order,[5] plaintiffs ask that this suit be maintained as a class action on behalf of the following class of plaintiffs:

> All White male employees of the Social Security Administration employed at the GS-12 and GS-13 levels as of the date of class certification who were not selected or promoted, or were otherwise subjected to disparate treatment in regard to performance appraisals, awards, bonuses and training as part of the SSA's alleged subjective personnel system, which discriminates against White males.

The Proposed Order states that the case should be maintained as a class action with respect to all causes of action and requests for equitable relief set forth in the complaint. The Order further seeks designation of the three plaintiffs as class representatives and of their attorneys as counsel for the class.

III

Applicable Principles

Rule 23(a) provides as follows:

> (a) PREREQUISITES TO A CLASS ACTION. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1)

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action programs in federal agencies creating a quota or reverse discrimination be eliminated.

[5] Plaintiffs have attached to their motion for class certification a "Proposed Order Class Certification."

> the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Under the Rule, certification of a class action requires that the action meet the requirements of a two-step test. *In re A.H. Robins Co., Inc.*, 880 F.2d 709, 727 (4th Cir.), *cert. denied*, 493 U.S. 959, 107 L. Ed. 2d 362, 110 S. Ct. 376 (1989). As a first step, the action must satisfy all four of the prerequisites mandated by subsection (a), namely (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation (emphasis in original). *Id.* If the plaintiffs can meet these requirements, the next step demands that the action fit within at least one of the three categories of actions identified in subsection (b) of the Rule. 880 F.2d at 727-28.

In *Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1312 (4th Cir. 1978), the Fourth Circuit cautioned that a district court in resolving the issue of class certification "may not" confine itself to the allegations of the complaint. Specific findings are necessary based on a preliminary exploration of the merits. *Id.* at 1312-13. To aid in making such findings, discovery is to be encouraged. *Id.* at 1313. In *Shelton*, the Court noted that there is a sharp line of demarcation between an individual action seeking to become a class action and an actual class action. *Id.* at 1304.

In *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 405, 52 L. Ed. 2d 453, 97 S. Ct. 1891 (1977), the Supreme Court admonished that in a class action brought under Title VII, even considering the broad, remedial purposes of the statute, "careful attention to the requirements of Fed. Rule Civ. Proc. 23 remains nonetheless indispensable." *See also Stastny v. Southern Bell Tel. & Tel. Co.*, 628 F.2d 267, 273 (4th Cir. 1980). More recently, the Supreme Court in *General Telephone Co. v. Falcon*, 457 U.S.

147, 161, 72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982) reiterated "that a Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." The inquiry which the district court must make requires development of an adequate record and the burden of producing such a record "lies of course with the party who has the burden of establishing the propriety of class action maintenance -- the class representative." *Stastny*, 628 F.2d at 277.[6]

In this particular case, the Preliminary Scheduling Order entered by the Court permitted the parties to undertake discovery relating to the question whether plaintiffs' claims satisfied the requirements of Rule 23. Over a period of some three months, the parties engaged in discovery, including the taking of depositions, the serving of interrogatories and the production of documents. What the Court must here determine is whether plaintiffs have on this record met their burden of satisfying the requirements of Rule 23.

IV

Discussion

Following its review of the record established during the preliminary discovery period, this Court has concluded that plaintiffs have failed to meet their burden of showing that this case should proceed as a class action. Plaintiffs may go forward with their individual claims but they may not litigate

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[6] It is thus well settled in the Fourth Circuit that the proponent of class certification has the burden of establishing the right to such certification under Rule 23. *Doctor v. Seaboard Coast Line R.R. Co.*, 540 F.2d 699, 707 (4th Cir. 1976); *Windham v. American Brands, Inc.*, 565 F.2d 59, 64 n.6 (4th Cir. 1977), *cert. denied*, 435 U.S. 968, 56 L. Ed. 2d 58, 98 S. Ct. 1605 (1978).

this case as representatives of the class defined in their Proposed Order.[7]

Plaintiffs have asked the Court to certify a broadly-defined nationwide class of white male employees of the SSA at the GS-12 and GS-13 levels. Were such a class to be certified it would be a massive one, potentially including more than 5,100 white males.[8] Although all three plaintiffs are located at SSA headquarters in Woodlawn, Maryland, the class would include GS-12 and GS-13 employees in other states at ten regional offices and numerous field components. Plaintiffs propose that the class include not only GS-12 and GS-13 employees who were not selected or promoted but also all other such employees who were subjected to discrimination in regard to performance appraisals, awards, bonuses and training as a part of the SSA's personnel system. In their reliance on an across-the-board approach to Title VII class certification, plaintiffs have here failed to satisfy the Rule 23 prerequisites of commonality and typicality.

The principal argument advanced by plaintiffs in seeking class certification is that all of the members of the proposed class have been subjected to race and sex discrimination and that by its very nature this action involves class-wide wrongs.[9] But this across-the-board approach has been rejected by the Supreme Court and the Fourth Circuit. In Falcon, the Supreme Court said:

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[7] In their memoranda, plaintiffs have identified three potential sub-classes. It is not necessary for the Court to consider the composition of those suggested sub-classes since plaintiffs have failed to show that they are entitled to the overall class which they have asked the Court to certify in their Proposed Order.

[8] As of September 30, 1995, there were 3,311 white males employed by SSA at the GS-12 level and 1,793 employed at the GS-13 level.

[9] At the hearing on their motion for class certification, plaintiffs specifically argued that their claims met the typicality requirement because all members of the class were subjected to discrimination based on the fact that they were white males. (Tr. at 16.)

> If one allegation of specific discriminatory treatment were sufficient to support an across-the-board attack, every Title VII case would be a potential companywide class action. We find nothing in the statute to indicate that Congress intended to authorize such a wholesale expansion of class action litigation.

457 U.S. at 159.

In *Stastny*, the Fourth Circuit held that the mere fact that racial discrimination formed the basis for the plaintiffs' claims did not relieve the plaintiffs in that case of the obligations imposed by Rule 23 to prove "the specific fitness, on its own facts" of the Title VII case in question. 628 F.2d at 273. The commonality and typicality requirements of Rule 23(a) tend to merge. *Falcon*, 457 U.S. at 157 n.13. Since inquiries into the commonality of issues and the typicality of claims in a Title VII case are closely related, they may for convenience be referred to collectively as "the commonality criteria." *Stastny*, 628 F.2d at 273 n.8.

In *Falcon*, the Supreme Court had before it a Title VII case in which the plaintiff claimed that his employer did not promote him because he was a Mexican-American. 457 U.S. at 149 Plaintiff sought on behalf of similar Mexican-Americans certification of a class of persons who were then employed by the defendant or who might be employed at its place of business in Irving, Texas. *Id.* at 150-51. The Fifth Circuit had approved certification of the requested class based on an across-the-board rule. *Id.* at 153. In reversing certification of the class on the ground that plaintiff had not met his burden of satisfying the commonality criteria, the Supreme Court said the following:

> We cannot disagree with the proposition underlying the across-the-board rule--that racial discrimination is by definition class discrimination. But the allegation that such discrimination has occurred neither determines whether a class action may be

> maintained in accordance with Rule 23 nor defines the class that may be certified. Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims. For respondent to bridge that gap, he must prove much more than the validity of his own claim. Even though evidence that he was passed over for promotion when several less deserving whites were advanced may support the conclusion that respondent was denied the promotion because of his national origin, such evidence would not necessarily justify the additional inferences (1) that this discriminatory treatment is typical of petitioner's promotion practices, (2) that petitioner's promotion practices are motivated by a policy of ethnic discrimination that pervades petitioner's Irving division, or (3) that this policy of ethnic discrimination is reflected in petitioner's other employment practices, such as hiring, in the same way it is manifested in the promotion practices. These additional inferences demonstrate the tenuous character of any presumption that the class claims are "fairly encompassed" within respondent's claim.

Id. at 157-58 (footnotes omitted).

In *Falcon*, the Supreme Court held that the plaintiffs were not entitled to certification of a class consisting both of employees who were not promoted because they were Mexican-Americans and also of applicants for employment who were not hired because they were Mexican-Americans. *Id.* at 158-59. For similar reasons, plaintiffs in this case are

not entitled to certification of a class consisting both of SSA employees at the GS-12 and GS-13 levels who were not promoted and also of such employees who were subjected to disparate treatment in regard to performance appraisals, awards, bonuses and training.

Likewise of controlling significance here is the well-reasoned and comprehensive opinion of Circuit Judge Phillips in *Stastny*. As in this case, *Stastny* was a suit brought under Title VII, in which claims of discriminatory denials of promotions to management positions had been asserted. 628 F.2d at 270. Plaintiffs there sought certification of a state-wide class of employees who had been denied promotions. *Id.* There are striking similarities between *Stastny* and the case here pending before this Court.

In *Stastny*, the Fourth Circuit considered whether the district court had properly certified a broadly-defined class of female employees who were located in various different facilities in North Carolina of defendant Southern Bell Telephone and Telegraph Company ("Southern Bell"). *Id.* Plaintiffs relied in part on statistical evidence based on data drawn from all of Southern Bell's North Carolina facilities. *Id.* In reversing the district court's certification of a class, the Fourth Circuit determined that plaintiffs had not met their burden of satisfying the commonality criteria. *Id.* at 278. After reviewing the facts of record, the Court said:

> Here, we conclude that the record finally laid before the court was deficient in critical ways that prevented any informed decision on certain of these crucial commonality questions. As a result, the commonality determinations implicit in the district court's certification could only have been made on the basis of speculation or larger leaps of inference than we think are permitted for Title VII cases under the teaching of *Rodriguez*.

Id.

The crucial deficiencies in the *Stastny* record which undercut the district court's certification of a statewide class were found by Circuit Judge Phillips to trace essentially to the district court's failure to appreciate the significance of the dispersion of Southern Bell's work force throughout a great number of geographically separated facilities in North Carolina. *Id.* Such dispersion made it unlikely that there was truly an employment pattern or practice, particularly one of intentionally disparate treatment, which sufficiently affected "in common" the class member employees in all the facilities. *Id.* Noting that the named plaintiffs were all located in defendants' Charlotte, North Carolina facility, the Court concluded that there was no showing in the record of the extent to which, if at all, the overall disparities were paralleled in the separate facilities or even in a statistically reliable sample of them. *Id.* at 278-79. The Court pointed out that there was no showing by direct evidence that a statewide practice or policy existed, either objectively or subjectively administered. *Id.* at 279. The Court went on to say the following:

> Inattention to the significance of the multifacility dispersion of the putative class left the record essentially silent on two critical factors for class action determination: the locus of autonomy in making the challenged employment decisions, *see Harriss*, 74 F.R.D. at 41, and intertwined with this, whether the management positions in question were filled from an essentially statewide work force labor pool; essentially from the work-force of each separate facility or from some intermediate geographical or group-of-facility pools.

Id.

Applying the principles of *Falcon* and *Stastny* here, this Court concludes that plaintiffs have not in this case satisfied

their burden as to the commonality criteria of Rule 23.[10] Plaintiffs seek to represent a class not only of those GS-12 and GS-13 employees who were not selected or promoted, but also of those GS-12 and GS-13 employees who were otherwise subjected to disparate treatment in regard to performance appraisals, awards, bonuses and training as part of the SSA's personnel system. The inference which the Court is called upon to make here is of a "tenuous" character. *Falcon*, 457 U.S. at 158. The conclusion that plaintiffs were denied promotions because of their race and sex would not justify the additional inferences that this policy of discrimination is reflected in each of petitioner's other challenged employment practices, such as the denial of appraisals, awards, bonuses and training. See id. Plaintiffs have here failed to make any "specific presentation" identifying the questions of law or fact common to the claims of plaintiffs and to those of the members of the class they seek to represent. Id. Class relief is appropriate only when the issues involved are common to the class as a whole. *Falcon*, 457 U.S. at 156; *Califano v. Yamasaki*, 442 U.S. 682, 700-701, 61 L. Ed. 2d 176, 99 S. Ct. 2545 (1979).

Furthermore, as in *Stastny*, there is in this case a wide dispersion of SSA's work force.[11] The evidence relied upon by plaintiffs does not give significance to the multi-facility dispersion of the proposed class. As in *Stastny*, the record

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[10] Another pertinent case in this Circuit is *Boley v. Principi*, 144 F.R.D. 305 (E.D. N.C. 1992). Denial of certification by the district court in that case was based, *inter alia*, on the ground that the unique factual differences in the claims of the potential class members made it difficult for plaintiff to show that his claim was "typical" of the claims of class members. *Id.* at 308. On appeal, the Fourth Circuit affirmed this determination. *Boley v. Brown*, 10 F.3d 218, 223 (4th Cir. 1993).

[11] Indeed in *Stastny*, there were merely a number of geographically separated facilities in North Carolina, and certification of a state-wide class was sought. 628 F.2d at 270. Here, SSA facilities are dispersed across the country, and plaintiffs have asked that a nationwide class be certified.

here is essentially silent concerning the locus of autonomy in making the challenged employment decisions and also concerning whether the positions in question were filled from an essentially nationwide work force pool or from the work force of each separate facility. *See Stastny*, 628 F.2d at 279.

In the absence of evidence to the contrary, the record in this case supports defendants' contention that there was a substantial amount of local autonomy in the SSA's regional offices and other components. The evidence relied upon by plaintiffs does not establish the existence of a nationwide policy or practice which controlled on a systematic basis the promotional and other challenged decisions made by regional and local supervisors. While evidence of subjectivity in employment decisions may well serve to bolster proof on the merits of individual claims of disparate treatment and may also bolster statistics of class-wide discrimination in the facility where the autonomy is exercised, "it cuts against any inference for class action commonality purposes that local facility practices were imposed or enforced [nationwide] with respect to a [nationwide] class." *Id.* Any finding by this Court that plaintiffs had satisfied commonality requirements could be made only "on the basis of speculation or larger leaps of inference" than permitted by the record here. *Id.* at 278.

All three plaintiffs are located at SSA headquarters in Woodlawn, Maryland. Each of them is employed at either the GS-12 or the GS-13 level in one of the Offices of the Deputy Commissioner. Whether or not a particular GS-12 or GS-13 employee in a particular SSA office outside Maryland was denied a promotion because of his sex or race would depend upon a myriad of different factors, including the applicant's previous work experience and his qualifications for the particular position as compared with those of competing applicants. In contending that their claims are typical of GS-12 and GS-13 employees in many other regional offices, plaintiffs overlook the fact that the demographics and the composition of the labor force in other areas of the country are certainly different from those to be found in Maryland. In

the absence of proof to the contrary, the reasonable inference is "that there were in effect as many labor pools as there were separate and essentially autonomous facilities." *Stastny*, 628 F.2d at 279. Since the Supreme Court's decision in Falcon, courts have insisted on detailed affidavits and other evidence to determine if the individual claims share questions of law or fact with the class claims and if the individual claims are typical of those brought for the class. *Stambaugh v. Kansas Dep't. of Corrections*, 151 F.R.D. 664, 672 (D. Kan. 1993); 5 Herbert B. Newberg, *Newberg on Class Actions* § 2413, at 24-52 to 24-54 (3d ed. 1992). Plaintiffs have produced no affidavits from other GS-12 and GS-13 employees or other specific evidence of the existence of an aggrieved class. See *Sheehan v. Purolator, Inc.*, 103 F.R.D. 641, 648-649 (E.D.N.Y. 1984), *aff'd*, 839 F.2d 99 (2d Cir.), *cert. denied*, 488 U.S. 891, 102 L. Ed. 2d 216, 109 S. Ct. 226 (1988). The statistics relied upon by plaintiffs are not specific enough to allow this Court to discern the outline of a class that can properly be certified. *See Wagner v. Taylor*, 266 U.S. App. D.C. 414, 836 F.2d 578, 594 (D.C. Cir. 1987). All that this Court has before it in support of plaintiffs' motion is "a combination of broad conclusory allegations of widespread discrimination and a jumble of numbers." 836 F.2d at 595.

Accordingly, this Court concludes on the record before it that plaintiffs have not met their burden under Rule 23(a)(2) of establishing that there are questions of law and fact common to the proposed class, nor have they met their burden under Rule 23(a)(3) of establishing that the claims asserted by them are typical of the claims of the class.[12]

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[12] Because this Court has determined that plaintiffs have not met their burden as to the commonality and typicality requirements of Rule 23, it is not necessary to address defendants' other arguments that plaintiffs have not shown that the defined class is so numerous that joinder of all members is impracticable, that they have not shown that the representative parties will fairly and adequately protect the interests of the class and that they have not satisfied the requirements of Rule 23(b)(2) and Rule 23(b)(3).

V

Conclusion

For all the reasons stated, this Court has concluded that plaintiffs are not entitled to certification of this case as a class action under Rule 23. Accordingly, it is this 24th day of August, 1998 by the United States District Court for the District of Maryland,

ORDERED that plaintiffs' motion for class certification is hereby denied.

/s/ Alexander Harvey II
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MICHAEL H. BOSTRON and
MAURICE R. duBOIS

Plaintiffs

vs. CIVIL NO. H-97-3154

KENNETH S. APFEL

Defendant

E. David Hoskins and Law Offices of Peter G. Angelos, P.C., Baltimore, Maryland, for plaintiffs.

Allen F. Loucks, Assistant United States Attorney and Larry D. Adams, Assistant United States Attorney, Baltimore, Maryland, for defendants.

HARVEY, Senior Judge

DATED: July 19, 2000

This Title VII case has had a lengthy and tortuous history, culminating in a recent trial in which the jury was unable to agree upon a final verdict as to all of the issues presented to it. A mistrial was declared by the Court, and a Partial Judgment has been entered.

As a result of numerous pretrial rulings made by the Court, only some of the many claims of plaintiffs Michael H. Bostron and Maurice R. DuBois were presented to the jury.[1] Seeking relief under Title VII of the Civil Rights Act of 1964,

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[1] Claims of John Boyer, a third plaintiff in the case, were dismissed for the reasons stated in the Court's Memorandum and Order of December 2, 1999.

as amended, 42 U.S.C. § 2000e, *et seq.*, these two employees of the Social Security Administration (the "SSA") alleged in their complaint that the SSA had denied them numerous promotions because they were males. Suit has been brought against Kenneth S. Apfel, the Commissioner of Social Security.

Following extensive pretrial proceedings and the entry of a Pretrial Order and a Supplemental Pretrial Order, the case came on for trial before a jury. Plaintiff Bostron presented to the jury his claims that, because of his sex, he was discriminatorily denied twenty-six promotions during the period from 1988 through 1998, and plaintiff DuBois presented to the jury his claims that, because of his sex, he was discriminatorily denied three promotions in 1997 and 1998.[2] The trial lasted for some nine days. After deliberating for more than eleven hours over a period of two days, the jury returned a verdict in favor of defendant Apfel against plaintiff Bostron as to one of the promotional positions sought by him and in favor of defendant Apfel against plaintiff DuBois as to one of the promotional positions sought by him. However, the jury indicated that it was hopelessly deadlocked as to all of the other positions at issue.[3] On May 15, 2000, the Court declared a mistrial and discharged the jury.

Prior to the enactment of the Civil Rights Act of 1991, a plaintiff suing under Title VII was not entitled to a jury trial. *See Landgraf v. USI Film Products*, 511 U.S. 244, 247, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994). Five of the promotional positions sought by plaintiff Bostron were filled before the 1991 Act became effective. Counsel accordingly agreed that the Court should try and decide the issues raised by those five

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[2] At the close of plaintiffs' case, the claim of plaintiff Bostron that he had also been subjected to racial discrimination was dismissed.

[3] In a Note to the Court, the jury stated that it was "firmly" deadlocked and that more time spent in deliberations "won't get us anywhere."

positions with the jury acting in an advisory capacity pursuant to Rule 39(c), F.R.Civ.P.

After declaring a mistrial as to the positions with respect to which the jury could not agree on a verdict, the Court rendered an oral opinion making findings of fact and conclusions of law. Applying the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973) burden of proof scheme, the Court first determined that plaintiff Bostron had not as to the five positions at issue established a prima facie case of discrimination in violation of Title VII. The Court further found that, in any event, defendant had proved that there were legitimate, nondiscriminatory reasons for SSA's refusal to promote plaintiff Bostron to those positions. Finally, the Court, as the factfinder, determined that plaintiff Bostron had not proved that the reasons given by defendant were pretextual. The Court concluded that the statistical and other evidence presented by plaintiffs was not sufficient to show that defendant had intentionally discriminated against plaintiff Bostron insofar as each of these five positions was concerned. Accordingly, judgment was entered in favor of defendant against plaintiff Bostron as to those particular five positions.

Presently pending before the Court is a renewed motion for judgment as a matter of law filed by defendant pursuant to Rule 50(b), F.R.Civ.P. By way of this motion, defendant seeks the entry of judgment in his favor on all of the remaining unresolved claims asserted in this case by both plaintiff Bostron and plaintiff DuBois.[4] Memoranda in support of and in opposition to this motion have been filed by the parties and reviewed by the Court. A hearing on the pending motion has been held in open court. For the reasons stated

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[4] As a result of the jury's partial verdict and the Court's oral opinion, plaintiff Bostron's unresolved claims relate to twenty promotional positions, and plaintiff DuBois' unresolved claims relate to two promotional positions.

herein, defendant's renewed motion for judgment as a matter of law will be granted.

I

BACKGROUND

The background facts of this litigation have been set forth in some detail in prior opinions of the Court.[5] For the purposes of the Court's rulings on the pending motion, those background facts need not be repeated here except insofar as any such additional facts may be relevant to the issues raised by the pending motion. In the complaint, plaintiff Bostron alleged that he had been discriminatorily denied promotions to 154 positions, and plaintiff DuBois alleged that he had been discriminatorily denied promotions to "numerous" positions. As a result of pretrial rulings of the Court, Bostron was permitted to present to the jury his claims that, because of his sex, he was discriminatorily denied twenty-six promotions during the period from 1988 through 1998, and DuBois was permitted to present to the jury his claims that, because of his sex, he was discriminatorily denied three promotions in 1997 and 1998. Discovery revealed that white males had been promoted to many of the other positions sought by plaintiffs, making it inappropriate for plaintiffs to seek recoveries under Title VII as to those claims.

At the trial, both sides called expert and other witnesses, and numerous exhibits were admitted in evidence. Plaintiffs, in seeking to prove that the SSA had intentionally discriminated against them because of their sex, relied almost entirely on agency-wide statistical evidence. Interpreting these statistics, Dr. Frederick Derrick, plaintiff's expert, opined that the SSA, in making the promotional decisions at

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[5] *See Bostron v. Apfel*, 182 F.R.D. 188 (D. Md. 1998); Memorandum and Order of August 18, 1999 ruling on the parties' motions for summary judgment and Memorandum and Order of March 17, 2000 granting in part and denying in part defendant's motion for partial summary judgment.

issue, had discriminated against plaintiffs because they were males.

At the close of plaintiffs' case, defendant orally moved for judgment as a matter of law pursuant to Rule 50(a). That motion was denied. At the close of all the evidence, defendant once again moved under Rule 50(a) for judgment as a matter of law, and once again this motion was denied by the Court. The case was then presented to the jury under lengthy instructions from the Court. When the jury could not agree on a verdict as to all of the issues in the case, a mistrial was declared.

II

Applicable Legal Principles

It is well established that Rule 50(b) permits the filing by a party of a renewed motion for judgment as a matter of law in the event that a mistrial has been declared. *DeMaine v. Bank One Akron, N.A.*, 904 F.2d 219, 220-221 (4th Cir. 1990). Rule 50(b) specifically provides that if no verdict was returned by a jury, the Court may, in disposing of a renewed motion, "direct the entry of judgment as a matter of law or may order a new trial."

In ruling on a motion for judgment as a matter of law, the trial court should consider the record as a whole viewing the evidence presented in the light most favorable to the party against whom the motion is made. *Marder v. G.D. Searle & Co.*, 630 F. Supp. 1087, 1088 (D.Md. 1986), *aff'd without op. sub nom., Wheelahan v. G.D. Searle & CO.*, 814 F.2d 655 (4th Cir. 1987). When the evidence is viewed in such a light, judgment should be entered notwithstanding the jury's failure to reach a verdict if insufficient evidence was presented to support a verdict for the nonmoving party. 630 F. Supp. at 1089. A district court should enter judgment as a matter of law in favor of a defendant if the plaintiff has failed to produce substantial evidence in support of its claim. *DeMaine*, 904 F.2d at 220; *Business Dev. Corp. v. United*

States, 428 F.2d 451, 453 (4th Cir.) *cert. denied*, 400 U.S. 957 (1970). Speculative or conjectural inferences are not sufficient to support a verdict in favor of a party opposing a motion for judgment as a matter of law. *Business Dev. Corp.*, 428 F.2d at 453. More than a scintilla of evidence is required. *Mann v. Bowman Transp., Inc.*, 300 F.2d 505, 510 (4th Cir. 1962). An issue may be removed from the jury if evidence provides a mere "possibility" yet not a "probability" of proof. *Mayberry v. Dees*, 663 F.2d 502, 510 (4th Cir. 1981), *cert. denied*, 459 U.S. 830, 74 L. Ed. 2d 69, 103 S. Ct. 69 (1982).

Each plaintiff in this case must first establish a prima facie case of discriminatory failure to promote as to each position sought by him. Each plaintiff must prove (1) that he is a member of a protected group; (2) that he applied for the position in question; (3) that he was qualified for the position; and (4) that he was rejected for the position under circumstances giving rise to an inference of unlawful discrimination. *McDonnell Douglas Corp.*, 411 U.S. at 802; *Carter v. Ball*, 33 F.3d 450, 458 (4th Cir. 1994); *McNairn v. Sullivan*, 929 F.2d 974, 977 (4th Cir. 1991).

After each plaintiff has made a prima facie showing, the burden shifts to the defendant to produce evidence "that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981). This burden is one of production, not of persuasion, and it involves no credibility assessment. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993). The "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine*, 450 U.S. at 253.

Once the defendant has articulated a legitimate, nondiscriminatory explanation for its decision, each plaintiff is then given "the opportunity to prove by a preponderance of the evidence that the legitimate reasons were not its true reasons, but were a pretext for discrimination." *Id.* A plaintiff

may attempt to establish that he was a victim of intentional discrimination "by showing that the employer's proffered explanation is unworthy of credence." *Id.* at 256. Moreover, although the presumption of discrimination drops out once the defendant meets its burden of production, the trier of fact may still consider the evidence establishing the plaintiff's *prima facie* case "and all inferences drawn therefrom ... on the issue of whether the defendant's explanation is pretextual." *Id.* at 255, n.10. Thus, "a plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 2000 WL 743663, at *9 June 12, (2000).

The Fourth Circuit has indicated that "pattern and practice evidence has little, if any, relevance in an individual disparate treatment action." *McClosky v. Prince George's County, MD*, 103 F.3d 118 (Table), 1996 U.S. App. LEXIS 33041, 1996 WL 726854, at *1 (4th Cir. Dec. 18, 1996). In *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742 (4th Cir. 1998), vacated on other grounds, 119 S. Ct. 2388 (1999), the Fourth Circuit discussed the different roles played by statistical evidence presented in a class action disparate treatment case when compared to that presented in an individual disparate treatment case, stating:

> In a class action pattern or practice case, the plaintiffs first litigate common questions of fact, i.e., whether the employer utilized a pattern or practice which discriminated against the class ... When the class plaintiffs prove the existence of a discriminatory practice, then that finding benefits them in the adjudication of individual claims by creating a presumption that the individual class members were victims of the discriminatory practice ... On the other hand, an individual plaintiff, in a non-class action alleging employment discrimination is not litigating common questions of

> fact, but the discrete question of whether the employer discriminated against the plaintiff in a specific instance ...

Id. at 761. (Citations omitted).

In several cases, judges of this Court have concluded that statistical evidence is entitled to little weight in a disparate treatment case. *See Davis v. Litton Bionetics, Inc.*, 444 F. Supp. 638, 646 (D.Md. 1978) (holding that statistical evidence of the racial composition of employer's supervisory personnel was entitled to "little weight" where the "critical issues relate to individualized decisions concerning a particular employee"); *Opara v. Modern Mfg. Co.*, 434 F. Supp. 1040, 1044-45 (D.Md. 1977) (holding that where the case is an individual suit for discrimination, but not a class action, statistics do not play a vital role in determination of the issues before the court). Courts in other circuits have also addressed the role played by statistical evidence in individual disparate treatment actions and the weight to be accorded such evidence in suits of this sort. In *Gilty v. Village of Oak Park*, 919 F.2d 1247, 1252 (7th Cir. 1990), the Seventh Circuit noted that in the context of an individual disparate claim action, statistical evidence "can only be collateral to evidence of specific discrimination against the actual plaintiff." In *Carmichael v. Birmingham Saw Works*, 738 F.2d 1126 (11th Cir. 1984), the Eleventh Circuit held:

> Statistics alone cannot make out a case of individual disparate treatment ... Although a case of classwide discrimination might be made out by "compelling independent [statistical evidence] of a pattern or practice of discrimination," in an individual case "each plaintiff bears the burden of proving that each employment decision that adversely affected him or her was the product of a discriminatory motive." (citing *Perryman v. Johnson Products Co.*, 698 F.2d 1138, 1143 (11th Cir. 1983)).

Id. at 1131-32.

In *Warren v. Halstead Industries, Inc.*, 613 F. Supp. 499 (D.C.N.C. 1985), the Court had occasion to consider the probative value of statistical evidence in an individual disparate treatment case where the plaintiff was attempting to prove that his employer's legitimate, nondiscriminatory reasons for the adverse actions at issue were pretextual. The Court concluded that "statistics are not sufficient to prove pretext in individual disparate treatment cases." *Id. at 506, n. 2* (citations omitted).

Courts in other circuits have made similar determinations. In *LeBlanc v. Great American Ins. Co.*, 6 F.3d 836 (1st Cir. 1993), the First Circuit ruled that:

> Statistical evidence in a disparate treatment case, in and of itself, rarely suffices to rebut an employer's legitimate, nondiscriminatory rationale for [an adverse employment action] ... This is because a company's overall employment statistics will, in at least many cases, have little direct bearing on the specific intentions of the employer when [taking an adverse employment action] ... "Without an indication of a connection between the statistics," the practices of an employer, and the employee's case, statistics alone are likely to be inadequate to show that the employer's decision [to take the adverse action against] the employee was impermissibly based on [illegitimate criterion]. (Citations omitted).

Id. at 848; *see also Walther v. Lone Star Gas Co.*, 977 F.2d 161, 162 (5th Cir. 1992); *Hudson v. IBM Corp.*, 620 F.2d 351, 355 (2d Cir. 1980); *King v. Yellow Freight Sys., Inc.*, 523 F.2d 879, 882 (8th Cir. 1975).

III

DISCUSSION

In support of their Rule 50(b) motion, defendant contends that the evidence presented at the trial was insufficient as a matter of law to satisfy the requirements of *McDonnell Douglas, Burdine* and *St. Mary's Honor Center*. As the Court instructed the jury, defendant did meet his burden of articulating legitimate, nondiscriminatory reasons for the failure of selecting officials to promote plaintiffs to each of the positions sought by them. Defendant now argues that no rational jury could find on the evidence presented at the trial that each plaintiff met his burden of proving that the legitimate, nondiscriminatory reason proffered by the defendant for not promoting each plaintiff to each particular position was false and a pretext for unlawful discrimination. As the Supreme Court held in *St. Mary's Honor Center*, a plaintiff has the ultimate burden at the final stage of the *McDonnell Douglas* proof scheme to prove intentional discrimination. 509 U.S. at 511. According to defendant, the statistical evidence presented, as interpreted by plaintiff's expert, cannot be considered as competent evidence of pretext and intentional discrimination in a case like this one involving individualized disparate treatment of each of the plaintiffs.

In opposing defendant's motion, plaintiffs argue that in addition to the statistical evidence presented, the record contains other evidence of pretext which would permit the jury to find in favor of each plaintiff as to the promotional positions at issue. In particular, plaintiffs note that the SSA, like other federal agencies, prepares on an annual basis an Affirmative Employment Plan ("AEP") designed to address various forms of discrimination in employment. According to plaintiffs, the existence of AEPs at the SSA and the pressure placed on selecting officials and high level managers to comply with them constituted sufficient circumstantial evidence of pretext for this issue to be decided by the jury in favor of the plaintiffs.

Following its careful review of all the evidence produced at the trial in this case, the Court has concluded that plaintiffs have failed to satisfy their burden of proving that they were subjected to intentional discrimination when they were not promoted to the various positions sought by them.[6] The Court is satisfied that the statistical evidence of record, as interpreted by plaintiffs' expert, is not competent evidence of wrongful disparate treatment of each plaintiff when he was not selected for the positions in question. Moreover, the inferences derived by plaintiffs from other facts of record are speculative and conjectural and do not constitute substantial evidence which would support a verdict in favor of either plaintiff Bostron or plaintiff DuBois as to any of the promotional positions sought by them.

What must be determined here is whether there exists sufficient evidence in the record showing that defendant's explanations for the adverse actions were false, that they constituted a pretext for discrimination and that the trier of fact might therefore reasonably conclude that defendant unlawfully discriminated against the plaintiffs. *Reeves*, 2000 WL 743663, at Decisions of this Court and of the Fourth Circuit indicate that statistical evidence has little, if any, relevance in an individual disparate treatment action. *McClosky*, 1996 WL 726854, at *1; *Opara*, 434 F. Supp. at 1044-45; *Carmichael*, 738 F.2d at 1131-32. Statistics alone are not sufficient to prove pretext in individual disparate treatment cases. *Warren*, 613 F. Supp. at 506, n.2. As the First Circuit noted in *LeBlanc*, 6 F.3d at 848, an employer's overall employment statistics will have little direct bearing on the specific intention of the employer when making a particular adverse employment decision. *See also Walther*, 977 F.2d at 162; *Hudson*, 620 F.2d at 355; *King*, 523 F.2d at 882.

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[6] In addition to Bostron and DuBois, only two other witnesses were called by plaintiffs to testify at the trial.

Plaintiffs argue that there is other circumstantial evidence in this case which would permit a jury to find that the SSA's justifications for the adverse employment actions were false and to therefore conclude that the SSA intentionally discriminated against each of the plaintiffs. Plaintiffs rely on various facts of record which they contend would inferentially prove pretext. In addition to the statistical evidence in the record, plaintiffs argue that pretext is demonstrated by (1) the utilization of "vacancy profiles" by selecting officials at the SSA when filling promotional positions; (2) the existence of AEPs at the SSA; (3) the inability of selecting officials to offer reasonable comparisons [**20] between the qualifications of the person selected for each position at issue and the plaintiff who sought the promotion; (4) the fact that selecting officials had to have their selections approved by higher level management at the SSA who were purportedly "governed" by the AEPs; (5) the failure of selecting officials to strictly adhere to SSA policy and procedure for filling promotional vacancies within the agency; and (6) the over-zealousness of selecting officials in implementing the AEPs. On the record here, this Court concludes that this so-called circumstantial evidence and the unwarranted inferences derived therefrom by plaintiffs, whether considered separately or in the aggregate, are not sufficient to support a verdict in favor of either plaintiff as to any one of the promotional positions still at issue.

The inherent deficiency in plaintiffs' reliance on this evidence is the complete absence of any indication that each selecting official who made each adverse employment decision was motivated by an intention to unlawfully discriminate against a plaintiff. That is to say, no evidence exists that any one of the many SSA officials who made each adverse decision specifically intended to discriminate against plaintiff Bostron or plaintiff DuBois because they were males. Fifteen different SSA selecting officials holding positions in different offices and departments of the SSA testified at the

trial.[7] Some of these individuals were males and others were females. Each of these witnesses detailed the reasons why a female applicant rather than Bostron or DuBois was selected for the 29 positions at issue in this case. The evidence presented by the plaintiffs at the trial did not include any statements by any one of these SSA officials or any documents authored by them which displayed a discriminatory animus against males.

There is no merit to plaintiffs' argument that the utilization by SSA representatives of vacancy profiles and the existence of AEPs constituted proof of pretext. Evidence does not exist that any one of the particular selecting officials relied on the vacancy profiles. Evidence of the existence of an affirmative action plan is generally relevant as proof of intentional discrimination "only if [the employer's adverse] actions were taken pursuant to the plan." *Brown v. McLean*, 159 F.3d 898, 904 (4th Cir. 1998) *(citing Cerrato v. San Francisco Community College Dist.*, 26 F.3d 968, 976 (9th Cir. 1994); *McQuillen v. Wisconsin Educ. Ass'n Council*, 830 F.2d 659, 666 (7th Cir. 1987)); *see also Whalen v. Rubin*, 91 F.3d 1041, 1045 (7th Cir. 1996); *Gadson v. Concord Hosp.*, 966 F.2d 32, 35 (1st Cir. 1992). There is no evidence whatsoever that any one of the selecting officials relied on the AEPs in making the promotional decisions challenged by a plaintiff. Several selecting officials testified that they did not even know of the existence of the AEPs and that they never discussed equal employment goals with senior managers. Evidence of the fact that, as required by federal law, the SSA like other federal agencies prepares an AEP on an annual basis is too attenuated to constitute substantial evidence that plaintiffs were subjected to intentional discrimination.

It is hardly of consequence that so many females were promoted to positions sought by the plaintiffs. As a result of the Court's pretrial rulings, the jury was permitted to consider

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[7] The testimony of two of these individuals, who were unavailable at the time of the trial, was presented by way of their depositions.

only those positions as to which a female received the promotions. However, there were many other SSA promotional positions sought by Bostron and DuBois over the years as to which males received the promotions. Since no sex discrimination could have resulted from those adverse employment actions, evidence pertaining to those positions was not presented by plaintiffs to the jury. Plaintiff Bostron has displayed a penchant for indiscriminately applying for promotions and other government jobs, within or without the SSA, whenever there were openings. In the complaint, he alleged that he had applied for SSA promotions on 154 occasions between January of 1988 and October of 1993, including 41 separate job openings in 1992 alone. In a Declaration filed in this case, Bostron stated that during the last 18 years, he has applied for over 300 jobs, including those posted by the Social Security Administration and by other government agencies. That so many different male and female selecting officials refused to promote him or hire him hardly supports his contention that he was highly qualified for each position he sought.

Plaintiffs also contend that the inability of the selecting officials to make reasonable comparisons of the qualifications of the persons selected to fill the positions at issue and of the plaintiffs constitutes evidence of pretext. But such inability is of little consequence because it is the plaintiffs and not the defendant who bear at all times the ultimate burden of persuading the trier of fact that defendant intentionally discriminated against them. *Burdine, 450 U.S. at 254.* Defendant has produced unrefuted evidence that someone other than plaintiff Bostron or plaintiff DuBois was preferred for each position at issue. Each plaintiff accordingly then had the burden of demonstrating that he was more qualified than the person actually selected for the promotion. The record here is devoid of any competent evidence which would satisfy that burden.

In a promotion case like this one, each plaintiff carries the burden to establish that he was the better qualified

candidate for the promotion sought. *Gairola v. Com. of Va. Dept. of General Services*, 753 F.2d 1281, 1287 (4th Cir. 1985). Plaintiffs rely on the fact that Bostron and also DuBois have each asserted that he is more qualified for each position at issue than was the person actually selected to fill the position. However, where a defendant produces proof that its reason for not promoting a Title VII plaintiff was that it selected the best qualified candidate for the position, a bare assertion by the plaintiff that he was more qualified for the position than the person actually selected is insufficient to demonstrate pretext. *Vaughan v. The Metra Health Cos., Inc.*, 145 F.3d 197, 202 (4th Cir. 1998). The fact that each plaintiff was on the so-called Best Qualified List for each position merely establishes that he, like the many other applicants, was qualified for consideration for the promotion. Such evidence does not prove that either Bostron or DuBois was more qualified than the person actually selected. In this particular case, neither Bostron nor DuBois was in a position to compare his qualifications with those of the person selected for each promotional position at issue because the person selected and her attributes were not even known by either one of them. Standing alone, self-serving claims of superiority in a Title VII case do not suffice. *Id.*

That selecting officials were required to have their selections approved by higher level SSA managers who may have had knowledge of the AEPs, provides little, if any, weight to plaintiffs' claim of pretext. General evidence of this sort is relevant only if the defendant's adverse employment actions "were taken pursuant to the Plan." *Brown*, 159 F.3d at 904. It is purely conjectural for plaintiffs to suggest that the higher level managers of the SSA who approved decisions of the selecting officials were "governed" by provisions of the AEPs. Nor is there proof that such higher level officials zealously undertook to promote affirmative action plans of the SSA. Even if evidence of this sort did exist, the claimed over-zealousness of higher level SSA managers in implementing the AEPs is not proof of pretext unless it can be shown that such over-zealousness was causally related to the particular

adverse employment action taken by a selecting official. Id. Plaintiffs have made no such showing.

Finally, plaintiffs have argued that selecting officials failed to strictly adhere to SSA policies and procedures concerning the filling of promotional vacancies. Such evidence is not proof of pretext because such a failure, in the absence of evidence indicative of discriminatory animus on the part of the selecting official, "would work to the detriment of all applicants for the job, [male and female] alike." *Blue*, 914 F.2d 525 at 541; *Kennedy*, 598 F.2d 337 at 341. Accordingly, plaintiffs' argument that selecting officials improperly preselected individuals for the position contrary to SSA policy is entitled to no weight in the absence of proof of discriminatory animus on the part of the selecting officials.

Plaintiffs' reliance on the very recent Supreme Court decision in Reeves is misplaced. There was no discussion in Reeves of the weight to be accorded statistical evidence in an individual disparate treatment action like this one in which the plaintiff has relied on such evidence as proof of pretext. In the *Reeves* case, the Supreme Court concluded that the plaintiff had at the trial made a substantial showing that his employer's explanation for plaintiff's discharge was false. 2000 WL 743663 at *7. Plaintiff's employer had contended that it had fired the plaintiff due to his failure to maintain adequate attendance records. At the trial, plaintiff offered detailed evidence that he had properly maintained attendance records. In Reeves, the Supreme Court held that proof that the defendant's explanation was false constituted one form of circumstantial evidence that is probative of intentional discrimination. *Id.* at *9, (citing *St. Mary's Honor Center*, 509 U.S. at 511). No such direct proof of the falsity of the selecting officials' explanations for their actions is present in this case. In the absence of such proof or of other evidence of the selecting officials' discriminatory animus, a jury as the trier of fact may not be permitted "to infer the ultimate fact of intentional discrimination." *Id.*

In sum, plaintiffs in this case have attempted to satisfy their burden of proving pretext by coupling together unwarranted inferences derived from bits and pieces of evidence presented at the trial. None of this evidence has been shown to be directly connected to the explanations given by SSA officials for the adverse employment actions taken. Nor may plaintiffs rely on statistical evidence in this disparate treatment case. In the absence of proof of pretext, plaintiffs have failed to meet their ultimate burden of proving intentional discrimination.

IV

CONCLUSION

For all the reasons set forth herein, this Court will grant defendant's renewed motion for judgment as a matter of law. An appropriate Order will be entered by the Court.

/s/ Alexander Harvey II
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MICHAEL H. BOSTRON and
MAURICE R. duBOIS

Plaintiffs

vs. CIVIL NO. H-97-3154

KENNETH S. APFEL

Defendant

ORDER

For the reasons stated in the Court's Opinion of today, it is this 19th day of July, 2000 by the United States District Court for the District of Maryland,

ORDERED:

1. That defendant's renewed motion for judgment as a matter of law is hereby granted;
2. That final judgment is hereby entered in favor of defendant as to all claims asserted by the plaintiffs in this case; and
3. That costs are hereby assessed against the plaintiffs.

/s/ Alexander Harvey II
Senior United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
April 4, 2001

No. 00-2238
CA-97-3154-H

MICHAEL H. BOSTRON

Plaintiff – Appellant

and

MAURICE R. DUBOIS; JOHN E. BOYER

Plaintiffs

v.

KENNETH S. APFEL, Commissioner of Social Security

Defendant – Appellee

On Petition for Rehearing En Banc

The appellant's petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK